

RECEIVED
FEDERAL ELECTION
COMMISSION

2015 NOV 19 PM 4: 54

FEDERAL ELECTION COMMISSION

999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

CELA

MUR: 6639

DATE COMPLAINT FILED: September 6, 2012

DATE OF NOTIFICATION: September 11, 2012

RESPONSE RECEIVED: January 13, 2015

DATE OF ACTIVATION: August 21, 2015¹

ELECTION CYCLE: 2012

**EXPIRATION OF SOL: June 20, 2017 –
August 20, 2017**

COMPLAINANT:

Jody Young

RESPONDENTS:

**Gary Johnson 2012, Inc. and Joseph Lilly in his
official capacity as treasurer²**

AUDIT REFERRAL: 15-06

DATE REFERRED: July 14, 2015

DATE OF NOTIFICATION: July 20, 2015

RESPONSE RECEIVED: August 24, 2015

DATE OF ACTIVATION: August 21, 2015

ELECTION CYCLE: 2012

**EXPIRATION OF SOL: February 21, 2017 –
June 20, 2017**

SOURCE:

Internally Generated

¹ The Commission received the Complaint on September 6, 2012. The Commission had previously determined in May 2012 that Gary Johnson was eligible to receive primary matching funds under the Presidential Primary Matching Payment Account Act, *see* 26 U.S.C. § 9033; 11 C.F.R. § 9033.1-2, and as a recipient of public funds, Gary Johnson 2012, Inc. was subject to a mandatory Commission audit covering the period of April 1, 2011, to May 31, 2014. *See* 26 U.S.C. § 9038; 11 C.F.R. § 9038.1; Attach. 1 at 1. Thus, on February 28, 2013, the Office of the General Counsel held MUR 6639 in abeyance pending the Commission's issuance of a Final Audit Report and any subsequent audit referral in the Title 26 audit of Gary Johnson 2012, Inc. *See* Informational Memorandum to Comm'n re: Holding Matter in Abeyance Pending Audit, MUR 6639 (Gary Johnson 2012, Inc.) (Feb. 4, 2013). The Commission approved the Final Audit Report on June 29, 2015, and on July 14, 2015, the Audit Division referred two findings to the Office of the General Counsel for possible enforcement action; the Complaint and referral were activated on August 21, 2015, while we awaited a response to the referral from the Respondents.

² On July 6, 2015, Gary Johnson 2012, Inc. filed an Amended Statement of Organization naming Joseph Lilly as its new treasurer. *See* Amended Statement of Organization at 1 (July 6, 2015).

RESPONDENTS:

**Gary Johnson 2012, Inc. and Joseph Lilly in his
official capacity as treasurer**

**RELEVANT STATUTES
AND REGULATIONS:**

52 U.S.C. § 30102(c)³
52 U.S.C. § 30104(a)-(b)
11 C.F.R. § 102.9(e)
11 C.F.R. § 104.3

INTERNAL REPORTS CHECKED:

Disclosure Reports
Audit Documents

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The Complaint in MUR 6639 and Audit Referral 15-06 ("Referral") each allege that during the 2012 election cycle, Gary Johnson 2012, Inc. and Joseph Lilly in his official capacity as treasurer ("Gary Johnson 2012") violated its disclosure obligations and used general election contributions for primary election expenses. The Complaint specifically alleges that Gary Johnson 2012 failed to properly disclose disbursements and debts owed to an entity called "Political Advisors" of Salt Lake City in its 2012 June, July, and August Monthly Reports because it reported multiple purposes for each disclosed disbursement or debt and failed to report any indebtedness to Political Advisors on its 2012 June and August Monthly Reports.⁴ The Complaint also alleges that Gary Johnson 2012 failed to specify whether the reports themselves or the disbursements on those reports were for the primary or general election, despite having reported receiving contributions designated for the general election.⁵ Similarly, the Referral referred two findings to the Office of the General Counsel for possible enforcement action:

³ On September 1, 2014, the Federal Election Campaign Act, as amended (the "Act") was transferred from Title 2 to new Title 52 of the United States Code.

⁴ Compl. at 1-3.

⁵ *Id.*

1 (1) the use of general election contributions for primary election expenses; and (2) the failure to
2 report a total of \$447,567 in debts and obligations.⁶

3 Because the allegations in MUR 6639 and the Referral overlap, we address them together
4 in this Report and recommend that the Commission open a MUR in the Referral and merge it
5 with MUR 6639. We also recommend that the Commission dismiss the Complaint's allegation
6 that Gary Johnson 2012 violated 52 U.S.C. § 30104(b) and 11 C.F.R. § 104.3 because the
7 committee reported multiple purposes for each disbursement or debt. Nevertheless, based on the
8 facts, analysis, and findings set forth in the Final Audit Report, which is incorporated by
9 reference, we recommend that the Commission find reason to believe that Gary Johnson 2012
10 violated 52 U.S.C. § 30104(b) and 11 C.F.R. § 104.3 by failing to disclose \$447,567 in debts and
11 obligations, and violated 11 C.F.R. § 102.9(e) by using general election contributions for primary
12 election expenses. Finally, we recommend that the Commission authorize pre-probable cause
13 conciliation and approve a conciliation agreement

14 **II. FACTUAL AND LEGAL ANALYSIS**

15 **A. Failure to Properly Itemize Disbursements and Debts**

16 On its 2012 June Monthly Report, Gary Johnson 2012 reported ten different
17 disbursements totaling \$188,320 to "Politcal [sic] Advisors" for the purpose of "Media Buys,
18 Canidate [sic] Travel, Campaign advisory and management."⁷ Next, on the 2012 July Monthly
19 Report, it reported 12 different disbursements totaling \$113,250 to "Politcal [sic] Advisors" for
20 the purpose of "Media Buys, Advertising, Candidate Travel, Advisory Services."⁸ And on the

⁶ See Referral at 1-7.

⁷ Compl. at 2.

⁸ *Id.*

1 2012 August Monthly Report, it reported eight disbursements totaling \$284,500 to "Political [sic]
2 Advisors" for the purpose of "Media Buys, Advertising, Candidate Travel, Advisory Services"
3 or "Media, Travel and Advisory Services in connection with Primary Election."⁹ In addition to
4 these disbursements, Gary Johnson 2012's 2012 July and August Monthly Reports listed four
5 separate new debts totaling \$304,145 owed to "Political [sic] Advisors" for the purposes of
6 "Advertsing [sic], Canidate [sic] Travel, Media Buys, Advisory Services," "Media, Travel,
7 Advertising and Advisory Service – Primary," "Travel, Media, Advertsing [sic]," and "Travel,
8 Media, Advertising, and Advisory" on Schedule D.¹⁰

9 The Complaint in MUR 6639 alleges that Gary Johnson 2012 did not properly disclose
10 the disbursements and debts owed to "Political Advisors" in its 2012 June, July, and August
11 Monthly Reports because it reported multiple purposes for each disbursement or debt.¹¹ On
12 February 11, 2013, the Reports Analysis Division ("RAD") sent Gary Johnson 2012 Requests for
13 Additional Information ("RFAs") inquiring about those disbursement descriptions.¹² The
14 RFAs requested that the committee amend its reports to clarify the descriptions listed above.¹³

15 On February 25, 2013, Gary Johnson 2012 amended the reports in question to disclose
16 additional debts and obligations owed to Political Advisors.¹⁴ These debts appear to correspond
17 to the previously reported disbursements to Political Advisors. For each itemized debt reported

⁹ *Id.* at 3.

¹⁰ *See id.* at 2.

¹¹ *Id.*

¹² *See* 2012 June Monthly Report RFAI (Feb. 11, 2013); 2012 July Monthly Report RFAI (Feb. 11, 2013); 2012 August Monthly Report RFAI (Feb. 11, 2013).

¹³ *Id.*

¹⁴ *See* Amended 2012 June Monthly Report (Feb. 25, 2013); Amended 2012 July Monthly Report (Feb. 25, 2013); Amended 2012 August Monthly Report (Feb. 25, 2013).

17044410498

1 on Schedule D, however, Gary Johnson 2012 continued to report multiple purposes. For
2 example, on its Amended 2012 June Monthly Report, the committee reported a new \$112,937
3 debt to Political Advisors for "Staff Hours – Mid-Level, Senior Political Advsiors [sic], Creative
4 Advertising, Campain [sic] Consult."¹⁵ The committee included a memo entry for each itemized
5 debt that provided a more detailed breakdown of each invoice that accounted for the debt.¹⁶
6 However, the committee also amended its previously reported disbursements on Schedule D to
7 change the purposes to "Payment on obligation."¹⁷

8 The Federal Election Campaign Act of 1971, as amended, ("the Act") and Commission
9 regulations require political committees to itemize disbursements and debts, and, for each
10 disbursement and debt, provide information including a brief description of the purpose of the
11 disbursement or the nature of the debt.¹⁸ Descriptions, when considered along with the identity
12 of the disbursement recipient, must be sufficiently specific to make the purpose of the
13 disbursement clear.¹⁹ The Commission has noted in its Statement of Policy regarding purpose of
14 disbursement entries that a disbursement to a vendor for something like "consulting" would be
15 inadequate unless the vendor's name included the specific type of consulting that the vendor
16 engaged in, such as "Smith Fundraising Consulting, Inc."²⁰ Examples of inadequate purposes

¹⁵ See Amended 2012 June Monthly Report at 81 (Feb. 25, 2013).

¹⁶ See *id.* at 82.

¹⁷ See *id.* at 72-75.

¹⁸ 52 U.S.C. § 30104(b); 11 C.F.R. § 104.3(b)(3)-(4), (d).

¹⁹ 11 C.F.R. § 104.3(b)(3)-(4); "Purpose of Disbursement" Entries for Filings with the Commission, 72 Fed. Reg. 887 (Jan. 9, 2007).

²⁰ 72 Fed. Reg. at 888.

1 listed in the Commission's Statement of Policy include "Consulting Service," "Compensation,"
2 and "Invoice."²¹

3 It appears that Gary Johnson 2012 violated 52 U.S.C. § 30104(b) and 11 C.F.R.
4 § 104.3(b)(3)-(4), (d) by not properly describing some of its disbursements' and debts' purposes
5 on both its original and amended reports (e.g., "advisory service," "advisory," and "payment on
6 obligation"). Nevertheless, the disbursements and debts on the three original reports addressed
7 in the Complaint — and on all Gary Johnson 2012's reports through the 2012 Year-End Report
8 — were reviewed in the Title 26 audit. The Final Audit Report did not include any finding
9 related to the ultimate payee or purpose description of disbursements and debts to Political
10 Advisors, and the Audit Division has informed us that, based on its review, the stated purposes
11 of the committee's disbursements and debts are mostly accurate, if not adequate.²² Further,
12 although some of the amended descriptions by Gary Johnson 2012 continue to inadequately
13 describe the purpose of disbursements and debts to Political Consultants, RAD considers Gary
14 Johnson 2012's amendments a sufficient response to its RFAs because the amended Schedule
15 Ds provide additional information in the memo entries and can be linked to the corresponding
16 "Payment on obligation" disbursements listed in Schedule B. In light of the corrective action
17 taken during the Audit and in response to RFAs, we recommend that the Commission exercise
18 its prosecutorial discretion and dismiss the allegation that Gary Johnson 2012 violated 52 U.S.C.
19 § 30104(b) and 11 C.F.R. § 104.3 by failing to properly itemize disbursements and debts.²³

²¹ *Id.*

²² Gary Johnson 2012's amended reports were outside the Final Audit Report's scope and therefore not included in the audit.

²³ See *Heckler v. Chaney*, 470 U.S. 821 (1985); see also Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545, 12,546 (Mar. 16, 2007) (noting that the Commission will dismiss a matter when the matter does not merit further use of Commission resources).

B. Failure to Report Debts and Obligations

The Complaint in MUR 6639 alleges that Gary Johnson 2012 failed to report any indebtedness to Political Advisors on its 2012 June and August Monthly Reports.²⁴ As set forth in the Final Audit Report, the Commission concluded that Gary Johnson 2012 failed to disclose \$447,567 in debts owed to nine vendors on Schedule D.²⁵ Of this amount, \$300,000 was a debt owed to Political Advisors²⁶ for a bonus after Johnson received the Libertarian Party nomination. According to the audit finding, Gary Johnson 2012 reported half of the \$300,000 debt when it was invoiced in December 2012, but, per the contract, the entire debt was incurred on May 4, 2012, and accordingly should have been reported on the committee's 2012 June Monthly Report.²⁷ In response to the audit, Gary Johnson 2012 filed amendments that materially corrected the omissions.²⁸

The Act requires committee treasurers to file reports of receipts and disbursements in accordance with the provisions of 52 U.S.C. § 30104.²⁹ The reports also must include the amount and nature of outstanding debts and obligations owed by or to the political committee.³⁰ Accordingly, because it failed to disclose \$447,567 in debts and obligations as described above,

²⁴ Compl. at 1-3.

²⁵ Attach. I at 22-25.

²⁶ The Final Audit Report refers to this entity as "NSON," which is the corporation listed on the committee's contracts and invoices. The Final Audit Report notes that NSON also does business as Political Advisors. *Id.* at 6 n.7. The committee reported all disbursements and debts to Political Advisors, not NSON. *Id.*

²⁷ *Id.* at 22-25.

²⁸ *Id.*

²⁹ 52 U.S.C. §§ 30104(a)(1), 30104(b)(2)-(7); 11 C.F.R. §§ 104.1(a), 104.3(a)-(c).

³⁰ 52 U.S.C. § 30104(b)(8); 11 C.F.R. § 104.3(d).

1 we recommend that the Commission find reason to believe that Gary Johnson 2012 violated
2 52 U.S.C. § 30104(b) and 11 C.F.R. § 104.3.

3 **C. Use of General Election Contributions for Primary Election Expenses**

4 The Complaint in MUR 6639 alleges that Gary Johnson 2012 failed to disclose whether
5 its disbursements were for the primary or general election, despite having reported receiving
6 contributions designated for the general election.³¹ In the audit, the Commission found that Gary
7 Johnson 2012 spent \$12,396 in contributions designated for the general election on primary
8 election expenses before the primary election date.³² According to the Final Audit Report, the
9 committee deposited \$22,396 in general election contributions in its primary election account,
10 and then made primary election expenses from this account.³³ Beginning on February 21, 2012,
11 the committee did not have sufficient primary election contributions to cover its primary election
12 expenses, and accordingly spent \$12,396 in general election contributions for primary election
13 expenses.³⁴

14 The Act requires treasurers to keep an account of all contributions received by a political
15 committee.³⁵ Commission regulations permit a candidate's committee to receive contributions
16 for the general election prior to the primary election provided the committee employs an
17 acceptable accounting method to distinguish between primary and general election
18 contributions.³⁶ The committee's records must demonstrate that prior to the primary election, the

³¹ Compl. at 1-3.

³² Attach. 1 at 20-22.

³³ *Id.*

³⁴ *Id.*

³⁵ 52 U.S.C. § 30102(c).

³⁶ 11 C.F.R. § 102.9(e)(1).

1704441-0502

1 committee's recorded cash-on-hand was at all times equal to or in excess of the sum of general
2 election contributions received less the sum of general election disbursements made.³⁷ The
3 Respondents argue that the audit finding applies an unreasonably strict reading of 11 C.F.R.
4 § 102.9(e)(2), and that the funds were essentially a short-term loan between accounts to cover
5 operating expenses.³⁸ However, the Final Audit Report correctly rejects these arguments, and
6 because Gary Johnson 2012 used general election contributions for primary election expenses as
7 described above, we recommend that the Commission find reason to believe that Gary Johnson
8 2012 violated 11 C.F.R. § 102.9(e).

³⁷ *Id.* § 102.9(e)(2).

³⁸ *See* AR 15-06 Resp. at 1.

1
2
3
4
5
6
7
8


9 **D. RECOMMENDATIONS**

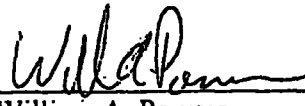
- 10
11 1. Open a MUR in AR 15-06.
12
13 2. Merge the new MUR with MUR 6639.
14
15 3. Dismiss the allegation that Gary Johnson 2012, Inc. and Joseph Lilly in his
16 official capacity as treasurer violated 52 U.S.C. § 30104(b) and 11 C.F.R. § 104.3
17 by failing to properly itemize disbursements and debts.
18

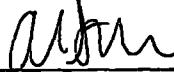
4. Find reason to believe that Gary Johnson 2012, Inc. and Joseph Lilly in his official capacity as treasurer violated 52 U.S.C. § 30104(b) and 11 C.F.R. § 104.3 by failing to disclose \$447,567 in debts and obligations.
5. Find reason to believe that Gary Johnson 2012, Inc. and Joseph Lilly in his official capacity as treasurer violated 11 C.F.R. § 102.9(e) by using general election contributions for primary election expenses.
6. Approve the attached Factual and Legal Analysis.
7. Authorize pre-probable cause conciliation with Gary Johnson 2012, Inc. and Joseph Lilly in his official capacity as treasurer.
8. Approve the attached proposed conciliation agreement.
9. Approve the appropriate letter.

Date

11/19/15


Kathleen M. Guith
Acting Associate General Counsel
for Enforcement


William A. Powers
Assistant General Counsel


Allison T. Steinle
Attorney

Attachments:

1. Final Audit Report
2. Factual and Legal Analysis



Final Audit Report of the Commission on Gary Johnson 2012, Inc

(April 1, 2011 – November 30, 2014)

Why the Audit Was Done

Federal law requires the Commission to audit every political committee established by a candidate who receives public funds for the primary campaign.¹ The audit determines whether the candidate was entitled to all of the matching funds received, whether the campaign used the matching funds in accordance with the law, whether the candidate is entitled to additional matching funds, and whether the campaign otherwise complied with the limitations, prohibitions, and disclosure requirements of the election law.

Future Action

The Commission may initiate an enforcement action, at a later time, with respect to any of the matters discussed in this report.

About the Campaign (p. 3)

Gary Johnson 2012, Inc is the principal campaign committee for Gary Johnson, a candidate for the Libertarian Party nomination for the office of President of the United States. The Committee is headquartered in Salt Lake City, Utah. For more information, see the chart on the Campaign Organization, p. 3.

Financial Activity (p. 4)

- **Receipts**
 - Contributions from Individuals \$ 2,249,318
 - Matching Funds Received 510,261
 - Total Receipts \$ 2,759,579**
- **Disbursements**
 - Operating Expenditures \$ 2,534,497
 - Fundraising Disbursements 153,019
 - Exempt Legal and Accounting 28,130
 - Disbursements**
 - Total Disbursements \$ 2,715,646**

Commission Findings (p. 5)

- Net Outstanding Campaign Obligations (Finding 1)
- Amounts Owed to the U.S. Treasury (Finding 2)
- Use of General Election Contributions for Primary Election Expenses (Finding 3)
- Reporting of Debts and Obligations (Finding 4)

Additional Issue (p. 6)

- Extension of Credit by a Commercial Vendor

¹ 26 U.S.C. §9038(a).

Final Audit Report of the Commission on Gary Johnson 2012, Inc

(April 1, 2011 – November 30, 2014)



Table of Contents

	Page
Part I. Background	
Authority for Audit	1
Scope of Audit	1
Inventory of Campaign Records	1
Committee Structure	1
Audit Hearing	2
Part II. Overview of Campaign	
Campaign Organization	3
Overview of Financial Activity	4
Part III. Summaries	
Commission Findings	5
Amounts Owed to the United States Treasury	7
Part IV. Commission Findings	
Finding 1. Net Outstanding Campaign Obligations	8
Finding 2. Amounts Owed to the U.S. Treasury	12
Finding 3. Use of General Election Contributions for Primary Election	
Expenses	20
Finding 4. Reporting of Debts and Obligations	22
Part V. Additional Issue	
Extension of Credit by a Commercial Vendor	26

Part I Background

Authority for Audit

This report is based on an audit of Gary Johnson 2012, Inc (GJ2012), undertaken by the Audit Division of the Federal Election Commission (the Commission) as mandated by Section 9038(a) of Title 26 of the United States Code. That section states, "After each matching payment period, the Commission shall conduct a thorough examination and audit of the qualified campaign expenses of every candidate and his authorized committees who received [matching] payments under section 9037." Also, Section 9039(b) of the United States Code and Section 9038.1(a)(2) of the Commission's Regulations state that the Commission may conduct other examinations and audits from time to time as it deems necessary.

Scope of Audit

This audit examined original and amended reports filed by GJ2012 before the audit notification letter was sent on December 3, 2012.² The audit also examined the original filings of the 2012 30 Day Post-General and Year-End reports. The following areas were covered by this audit:

1. the campaign's compliance with limitations for contributions and loans;
2. the campaign's compliance with the limitations for candidate contributions and loans;
3. the campaign's compliance with the prohibition on accepting prohibited contributions;
4. the disclosure of contributions received;
5. the disclosure of disbursements, debts and obligations;
6. the consistency between reported figures and bank records;
7. the accuracy of the Statement of Net Outstanding Campaign Obligations;
8. the campaign's compliance with spending limits;
9. the completeness of records; and
10. other campaign operations necessary to the review.

Inventory of Campaign Records

The Audit staff routinely conducts an inventory of campaign records before it begins audit fieldwork. GJ2012's records were materially complete and fieldwork commenced immediately.

Committee Structure

GJ2012 was the only campaign committee authorized by Gary Johnson, the Candidate, for the 2012 Presidential election. This committee conducted both primary and general election activity for the Candidate. GJ2012 opened two bank accounts: a primary account and a general account. In practice, GJ2012 deposited nearly all contributions

² Amendments filed after December 3, 2012, were given a limited review to determine if issues noted in the Preliminary Audit Report were corrected by GJ2012.

received before the Candidate's nomination in the primary account, and most contributions received after the nomination in the general account. GJ2012 received matching funds for the primary campaign and this audit covered committee activity and information obtained to determine whether or not expenses were qualified campaign expenses defrayed in connection with the primary election.

Audit Hearing

GJ2012 requested an audit hearing. The request was granted and the hearing was held on May 13, 2015. At the hearing, GJ2012 addressed issues related to Findings 2, 3 and 4 (pp. 12 through 25), and the Additional Issue (p. 26).

Part II Overview of Campaign

Campaign Organization

Important Dates	
• Date of Registration	April 22, 2011
• Date of Ineligibility ³	May 5, 2012
• Audit Coverage	April 1, 2011 - November 30, 2014 ⁴
Headquarters	Salt Lake City, Utah
Bank Information	
• Bank Depositories	One
• Bank Accounts	One primary checking account and one general checking account
Treasurer	
• Treasurer When Audit Was Conducted	Chet Goodwin
• Treasurer During Period Covered by Audit	Elizabeth Hepworth (4/22/11 – 1/4/12) Chet Goodwin (1/5/12 – Present)
Management Information	
• Attended Commission Campaign Finance Seminar	No
• Who Handled Accounting and Recordkeeping Tasks	Paid Staff

³ A threshold submission was submitted on April 26, 2012, and the Commission certified the Candidate as eligible to receive matching funds on May 24, 2012. The period during which the Candidate was eligible for matching funds ended on May 5, 2012, his date of ineligibility (DOI). However, GJ2012 submitted contributions for matching funds it had received before DOI. Due to the campaign's outstanding debt, GJ2012 was able to submit primary election contributions received after DOI for matching as well.

⁴ The Audit staff conducted limited reviews of receipts and expenditures after December 31, 2012 to determine whether the Candidate was eligible to receive additional matching funds.

170444407

Overview of Financial Activity (Audited Amounts)

Cash-on-hand @ April 1, 2011	\$ 0
Receipts	
o Contributions from Individuals ⁵	2,249,318
o Matching Funds Received ⁶	510,261
Total Receipts	\$ 2,759,579
Disbursements	
o Operating Expenditures	2,534,497
o Fundraising Disbursements	153,019
o Exempt Legal and Accounting Disbursements	28,130
Total Disbursements	\$ 2,715,646
Cash-on-hand @ December 31, 2012	\$ 43,933

⁵ GJ2012 received approximately 24,500 contributions from more than 1,400 individuals.

⁶ As of the Candidate's DOI (May 5, 2012), GJ2012 had received no matching funds. GJ2012 received 6 payments totaling \$632,017 as of January 8, 2013.

Part III

Summaries

Commission Findings

Finding 1. Net Outstanding Campaign Obligations

The Audit staff's review of GJ2012's financial activity through November 30, 2014, and estimated winding down costs indicated that the Candidate did not receive matching fund payments in excess of his entitlement.

In response to the Preliminary Audit Report recommendation, GJ2012 provided additional bank statements and invoices to show actual winding down costs, and did not dispute the Net Outstanding Campaign Obligations calculations contained in the Preliminary Audit Report.

The Commission approved a finding that the Candidate did not receive matching funds in excess of his entitlement. (For more detail, see p. 8.)

Finding 2. Amounts Owed to the U.S. Treasury

During audit fieldwork, the Audit staff's review of GJ2012's receipts and disbursements determined that primary election funds were spent on non-qualified campaign expenses and that matching funds were received for contributions that were not eligible to be matched.

In response to the Preliminary Audit Report recommendation, GJ2012 provided additional information, and disputed the Audit staff's conclusion.

The Commission determined that \$333,441 is payable to the United States Treasury. (For more detail, see p. 12.)

Finding 3. Use of General Election Contributions for Primary Election Expenses

During audit fieldwork, the Audit staff's review of GJ2012's receipts and disbursements during the pre-DOI period indicated that GJ2012 spent \$12,396 in general election receipts on primary election expenses prior to the Candidate's DOI.

In response to the Preliminary Audit Report, GJ2012 stated that the use of general election receipts for primary election expenses was an advance against anticipated matching funds. The Audit staff noted that short-term advances against matching funds must come from a qualified financial institution, and be secured by certified matching funds amounts.

The Commission approved a finding that GJ2012 used \$12,936 in general election contributions for primary election expenses prior to the general election. (For more detail, see p. 20.)

Finding 4. Reporting of Debts and Obligations

During audit fieldwork, the Audit staff's review of GJ2012's disbursements indicated that debts from seven vendors totaling \$407,455 were not disclosed on Schedule D-P (Debts and Obligations), as required.

In response to the Preliminary Audit Report, GJ2012 submitted additional invoices for debts to two vendors that were not previously disclosed to Audit staff. This resulted in a total of \$447,567 in debts owed to nine vendors that were not disclosed on Schedule D-P as required. GJ2012 amended its reports to materially correct the disclosure of debts and obligations on Schedule D-P.

The Commission approved a finding that that GJ2012 did not disclose debts to nine vendors totaling \$447,567, as required. (For more detail, see p. 22.)

Additional Issue

Extension of Credit by a Commercial Vendor

During audit fieldwork, the Audit staff's review of GJ2012's disbursements suggested that NSON⁷ made a prohibited contribution to GJ2012 by extending credit beyond its normal course of business and not making commercially reasonable attempts to collect \$1,752,032 from GJ2012 for services rendered.

In response to the Preliminary Audit Report, GJ2012 presented an affidavit from the proprietor of NSON and redacted contracts to dispute the Audit staff's suggestion that NSON made a prohibited contribution to GJ2012. The Audit staff did not consider these documents sufficient to verify that other clients were subject to the same billing practices or that GJ2012 was regularly and timely billed for services rendered.

The Commission did not approve by the required four votes the Audit staff's recommended finding that NSON made a prohibited contribution to GJ2012. Pursuant to Directive 70,⁸ this prohibited contribution is discussed in the "Additional Issue" section. (For more detail, see p. 26.)

⁷ NSON is a registered corporation in the state of Utah that also does business as Political Advisors. GJ2012 reported disbursements to Political Advisors, but all contracts and invoices were received from NSON.

⁸ Available at http://www.fec.gov/directives/directive_70.pdf

Summary of Amounts Owed to the United States Treasury

• Finding 2.A. (p. 14)	Payment of Non-Qualified Expenses with Primary Election Funds	\$ 332,191
• Finding 2.B. (p. 18)	Receipt of Matching Funds Based on Ineligible Contributions	1,250
Total Due U.S. Treasury		\$ 333,441

Part IV

Commission Findings

Finding 1. Net Outstanding Campaign Obligations

Summary

The Audit staff's review of GJ2012's financial activity through November 30, 2014, and estimated winding down costs indicated that the Candidate did not receive matching fund payments in excess of his entitlement.

In response to the Preliminary Audit Report recommendation, GJ2012 provided additional bank statements and invoices to show actual winding down costs, and did not dispute the Net Outstanding Campaign Obligations calculations contained in the Preliminary Audit Report.

The Commission approved a finding that the Candidate did not receive matching funds in excess of his entitlement.

Legal Standard

A. Net Outstanding Campaign Obligations (NOCO). Within 15 days after the candidate's date of ineligibility (see definition below), the candidate must submit a statement of "net outstanding campaign obligations." This statement must contain, among other things:

- The total of all committee assets including cash on hand, amounts owed to the committee and capital assets listed at their fair market value;
- The total of all outstanding obligations for qualified campaign expenses; and
- An estimate of necessary winding-down costs. 11 CFR §9034.5(a).

B. Date of Ineligibility. The date of ineligibility is whichever of the following dates occurs first:

- The day on which the candidate ceases to be active in more than one state;
- The 30th day following the second consecutive primary in which the candidate receives less than 10 percent of the popular vote;
- The end of the matching payment period, which is generally the day when the party nominates its candidate for the general election; or
- In the case of a candidate whose party does not make its selection at a national convention, the last day of the last national convention held by a major party in the calendar year. 11 CFR §§9032.6 and 9033.5.

C. Definition of Non-Qualified Campaign Expense. A non-qualified campaign expense is any expense that is not included in the definition of a qualified campaign expense (see below).

D. Qualified Campaign Expense. Each of the following expenses is a qualified campaign expense.

170444-10516

- An expense that is:
 - Incurred by or on behalf of the candidate (or his or her campaign) during the period beginning on the day the individual becomes a candidate and continuing through the last day of the candidate's eligibility under 11 CFR §9033.5;
 - Made in connection with the candidate's campaign for nomination; and
 - Not incurred or paid in violation of any federal law or the law of the state where the expense was incurred or paid. 11 CFR §9032.9.
- An expense incurred for the purpose of determining whether an individual should become a candidate, if that individual subsequently becomes a candidate, regardless of when that expense is paid. 11 CFR §9034.4.
- An expense associated with winding down the campaign and terminating political activity. 11 CFR §9034.4(a)(3).

E. Entitlement to Matching Payments after Date of Ineligibility. If, on the date of ineligibility (see above), a candidate has net outstanding campaign obligations as defined under 11 CFR §9034.5, that candidate may continue to receive matching payments for matchable contributions received and deposited on or before December 31st of the Presidential election year provided that he or she still has net outstanding campaign debts on the day when the matching payments are made. 11 CFR §9034.1(b).

F. Winding Down Costs. A primary election candidate who does not run in the general election may receive and use matching funds after notifying the Commission in writing of the candidate's withdrawal from the campaign for nomination or after the date of the party's nominating convention, if the candidate has not withdrawn before the convention. A primary election candidate who runs in the general election must wait until 31 days after the general election before using any matching funds for winding down costs, regardless of whether the candidate receives public funds for the general election. 11 CFR §9034.11(d).

Facts and Analysis

A. Facts

The Candidate's date of ineligibility (DOI) was May 5, 2012. The Audit staff reviewed GJ2012's financial activity through November 30, 2014, analyzed estimated winding down costs and prepared the Statement of Net Outstanding Campaign Obligations that appears on the following page.

Gary Johnson 2012, Inc
Statement of Net Outstanding Campaign Obligations
As of May 5, 2012
Prepared February 10, 2015

Assets

Cash in bank	\$ (10,856) ⁹	
Total Assets		\$ (10,856)

Liabilities

Accounts Payable (AP) for Qualified Campaign Expenses as of 5/5/12	\$ (1,268,352)	
AP (Primary Account) Billed Post-DOI	(713,952)	
Winding Down (WD) Costs (5/5/12 - 12/6/12)	0	
Actual WD Costs (12/7/12 - 11/30/14) [a]	(22,899)	
Estimated WD Costs (12/1/14 - 6/30/15) [b]	(112,268)	
Total Liabilities		\$(2,117,471)

Net Outstanding Campaign Obligations (Deficit) as of May 5, 2012		\$(2,128,327)
---	--	----------------------

Footnotes to NOCO Statement:

- [a] The General election was held on November 6, 2012. The winding down period began 31 days after the General election on December 7, 2012.
- [b] Estimated winding down costs will be compared to actual winding down costs and adjusted accordingly.

Shown below are adjustments for funds received after the Candidate's DOI on May 5, 2012 through January 8, 2013, the date GJ2012 received its last matching fund payment.

Net Outstanding Campaign Obligations (Deficit) as of May 5, 2012		\$(2,128,327)
Less: Contributions Received (May 6, 2012 to January 8, 2013)		1,216,661
Less: Matching Funds Received through January 8, 2013		632,017
Remaining Net Outstanding Campaign Obligations (Deficit) as of January 8, 2013¹⁰		\$ (279,649)

As presented above, the Candidate has not received matching funds in excess of his entitlement.

⁹ The primary election campaign's May 5, 2012 cash balance was negative due to short term use of funds from the general election account. See Finding 3 on p. 20 for more detail.

¹⁰ GJ2012 and its major vendor, NSON, are discussing the possibility of waiving the interest on debts not repaid. If this debt is forgiven, the NOCO will require an adjustment. See Additional Issue on p. 26 for additional detail.

170747-105-18

B. Preliminary Audit Report & Audit Division Recommendation

The Audit staff presented a preliminary NOCO statement and related work papers to GJ2012 representatives at the exit conference. The preliminary NOCO statement showed that GJ2012 was in a surplus position and GJ2012 would be required to repay some matching funds received to the U.S. Treasury.¹¹ The Audit staff requested that GJ2012 provide additional documentation after the exit conference to enable the Audit staff to update the NOCO statement as necessary. On January 24, 2014, and June 18, 2014, GJ2012 submitted additional invoices in support of debts incurred for primary election expenses. These additional invoices were mostly for interest owed on debts incurred in relation to the primary election that had not been paid, and one invoice previously not provided to the Audit staff for a debt incurred for fundraising activity in relation to the primary election. The Audit staff reviewed this documentation and revised the NOCO accordingly. As a result of this additional documentation, the revised NOCO indicated that the Candidate did not receive matching funds in excess of his entitlement.

The Audit staff recommended that GJ2012 demonstrate any adjustments it believes are required in connection with any part of the NOCO statement or provide any other additional comments.

C. Committee Response to Preliminary Audit Report

In response to the Preliminary Audit Report recommendation, GJ2012 did not dispute the NOCO calculations contained on the Preliminary Audit Report, however, provided additional bank statements and invoices to show actual and additional estimated winding down costs as well as additional accounts payable for qualified campaign expenses. These expenses have been incorporated into the revised NOCO that reflects a deficit of \$279,649 as of November 30, 2014. The revised NOCO indicates that the Candidate did not receive matching funds in excess of his entitlement.¹²

D. Draft Final Audit Report

The Draft Final Audit Report acknowledged that GJ2012 submitted additional documentation and did not dispute the NOCO calculations.

E. Committee Response to the Draft Final Audit Report

In response to the Draft Final Audit Report, GJ2012 accepted the Audit staff's Net Outstanding Campaign Obligations calculations that show that the Candidate did not receive matching fund payments in excess of his entitlement.

F. Audit Hearing

GJ2012 did not address Finding 1 during the audit hearing.

¹¹ This NOCO was prepared on December 12, 2013, and contains the same figures as the NOCO prepared on May 8, 2013. The May 8, 2013 NOCO was included in the Statement of Reasons In Support of Final Determination of Entitlement in the Matter of Governor Gary Johnson (LRA #905), dated November 14, 2013.

¹² GJ2012 and its major vendor, NSON, are discussing the possibility of waiving the interest on debts not repaid. If this debt is forgiven, the NOCO will require an adjustment. See Additional Issue on p. 26 for additional detail.

Commission Conclusion

On June 18, 2015, the Commission considered the Audit Division Recommendation Memorandum in which the Audit staff recommended the Commission find that the Candidate did not receive matching fund payments in excess of his entitlement.¹³

The Commission approved the Audit staff's recommendation.

Finding 2. Amounts Owed to the U.S. Treasury

Summary

During audit fieldwork, the Audit staff's review of GJ2012's receipts and disbursements determined that primary election funds were spent on non-qualified campaign expenses and that matching funds were received for contributions that were not eligible to be matched.

In response to the Preliminary Audit Report recommendation, GJ2012 provided additional information, and disputed the Audit staff's conclusion.

The Commission determined that \$333,441 is payable to the United States Treasury.

Legal Standard

A. Qualified Campaign Expense. Each of the following expenses is a qualified campaign expense.

- An expense that is:
 - Incurred by or on behalf of the candidate (or his or her campaign) during the period beginning on the day the individual becomes a candidate and continuing through the last day of the candidate's eligibility under 11 CFR §9033.5;
 - Made in connection with the candidate's campaign for nomination; and
 - Not incurred or paid in violation of any federal law or the law of the state where the expense was incurred or paid. 11 CFR §9032.9.
- An expense incurred for the purpose of determining whether an individual should become a candidate, if that individual subsequently becomes a candidate, regardless of when that expense is paid. 11 CFR §9034.4.
- An expense associated with winding down the campaign and terminating political activity. 11 CFR §9034.4(a)(3).

B. Definition of Non-Qualified Campaign Expense. A non-qualified campaign expense is any expense that is not included in the definition of a qualified campaign expense (see above). These include, for example, but are not limited to:

¹³ The Audit staff notes that in the response to the PAR and the DFAR, GJ2012 alluded to assets which have not yet been valued, and the possibility of debt settlement. The addition of assets and/or reduction of debt on the NOCO could result in the Candidate having received matching fund payments in excess of his entitlement.

170444-10320

- **Excessive expenditures.** An expenditure which is in excess of any of the limitations under 11 CFR §9035 shall not be considered a qualified campaign expense.
- **General election and post-ineligibility expenditures.** Except for winding down costs pursuant to 11 CFR §9034.4(a)(3) and certain convention expenses described in 11 CFR §9034.4(a)(6), any expenses incurred after a candidate's date of ineligibility, as determined under 11 CFR §9033.5, are not qualified campaign expenses. In addition, any expenses incurred before the candidate's date of ineligibility for goods and services to be received after the candidate's date of ineligibility, or for property, services, or facilities used to benefit the candidate's general election campaign, are not qualified campaign expenses.
- **Civil or criminal penalties.** Civil or criminal penalties paid pursuant to the Federal Election Campaign Act are not qualified campaign expenses and cannot be defrayed from contributions or matching payments. Any amounts received or expended to pay such penalties shall not be considered contributions or expenditures but all amounts so received shall be subject to the prohibitions of the Act.
- **Payments to candidate.** Payments made to the candidate by his or her committee, other than to reimburse funds advanced by the candidate for qualified campaign expenses, are not qualified campaign expenses.
- **Lost, misplaced, or stolen items.** The cost of lost, misplaced, or stolen items may be considered a nonqualified campaign expense. Factors considered by the Commission in making this determination shall include, but not be limited to, whether the committee demonstrates that it made conscientious efforts to safeguard the missing equipment; whether the committee sought or obtained insurance on the items; whether the committee filed a police report; the type of equipment involved; and the number and value of items that were lost. 11 CFR §9034.4(b).

C. Matching Funds Used for Non-Qualified Campaign Expenses. If the Commission determines that a campaign used matching funds for non-qualified campaign expenses, the candidate must repay the Secretary of the United States Treasury an amount equal to the amount of matching funds used for the non-qualified campaign expenses. 26 U.S.C. §9038(b)(2)(A).

D. Seeking Repayment for Non-Qualified Campaign Expenses. In seeking repayment for non-qualified campaign expenses from committees that have received matching fund payments after the candidate's date of ineligibility, the Commission will review committee expenditures to determine at what point committee accounts no longer contain matching funds. In doing this, the Commission will review committee expenditures from the date of the last matching funds payment to which the candidate was entitled, using the assumption that the last payment has been expended on a last-in, first-out basis. 11 CFR §9038.2(b)(2)(iii)(B).

E. Primary Winding Down Costs During the General Election Period. A primary election candidate who runs in the general election, regardless of whether the candidate

17044401-1

receives public funds for the general election, must wait until 31 days after the general election before using any matching funds for winding down costs related to the primary election. No expenses incurred by a primary election candidate who runs in the general election prior to 31 days after the general election shall be considered primary winding down costs. 11 CFR §9034.11(d).

F. How to Determine Repayment Amount for Non-Qualified Campaign Expenses When Candidate in Surplus Position. If a candidate must make a repayment to the United States Treasury because his or her campaign used matching funds to pay for non-qualified campaign expenses, the amount of the repayment must equal that portion of the surplus that bears the same ratio to the total surplus that the total amount received by the candidate from the matching payment account bears to the total deposits made to the candidate's accounts. 11 CFR §9038.2(b)(2)(iii).

G. Bases for Repayment. The Commission may determine that certain portions of the payments made to a candidate from the matching payment account were in excess of the aggregate amount of payments to which such candidate was entitled. Examples of such excessive payments include, but are not limited to, the following:

- Payments or portions of payments made on the basis of matched contributions later determined to have been non-matchable 11 CFR §9038.2(b)(1)(iii).

H. Notification of Repayment Obligation. The Commission will notify a candidate of any repayment determinations as soon as possible, but no later than three years after the close of the matching payment period. The Commission's issuance of the audit report to the candidate (under 11 CFR §9038.1(d)) will constitute notification for purposes of this section. 11 CFR §9038.2(a)(2).

Facts and Analysis

A. Payment of Non-Qualified Expenses with Primary Election Funds

1. Facts

During an examination of disbursement records, the Audit staff identified \$1,199,701¹⁴ in disbursements for general election expenses paid with primary election funds. Of this amount, disbursements totaling \$1,192,400 occurred during the period between the Candidate's DOI, May 5, 2012, and 31 days after the general election, December 7, 2012. During this period, expenses incurred are not considered primary winding down costs. Since these expenses are not related to the primary election of the Candidate, they are considered non-qualified campaign expenses.

In the post-election wind-down period, when wind-down expenses must be allocated between the primary and general election campaigns, \$7,301 was spent.¹⁵ Since these

¹⁴ The initial amount of non-qualified expenses was subsequently reduced to \$1,194,425 after the Audit staff calculated the matching funds cut-off date earlier (December 20, 2012) than had been previously calculated.

¹⁵ The amount using an end date of December 20, 2012 (as explained in the previous footnote) is \$2,025.

amounts were not allocated between campaigns, these are also non-qualified expenses. Additionally, the accounting staff for GJ2012 stated that expenses identified by themselves, or by NSON, as general election expenses were paid from the general account, and expenses identified as primary expenses were paid from the primary account. Of the expenses identified by the Audit staff as non-qualified expenses, expenses totaling \$1,191,856 were paid out of the general account.

After the Candidate's DOI, GJ2012 continued to raise funds to pay off the debt incurred during the primary election, as permitted by law. Approximately \$1.2 million in private contributions designated for the primary election were deposited into GJ2012's general election account, and were used to pay general election expenses. The Audit staff determined the private contributions designated for the primary election using the same calculations as in the Statement of Reasons In Support of Final Determination of Entitlement in the Matter of Governor Gary Johnson (LRA #905), dated November 14, 2013.

To determine which general election expenses were paid using the contributions designated for the primary election, the Audit staff followed the following procedures:

1. Used the list of primary and general contributions calculated for the Statement of Reasons In Support of Final Determination of Entitlement in the Matter of Governor Gary Johnson (LRA #905), dated November 14, 2013.
2. Used GJ2012's disbursement database of disbursements from the primary election account. The dates from GJ2012's database were the check dates rather than the dates that the checks cleared the bank account. Any disbursements from the bank statements that were not in GJ2012's database were also included by the Audit staff in this review. The same procedure was followed for the review of the general election account.
3. For each day analyzed, the Audit staff first summed the three different types of receipts separately (primary contributions, general contributions and receipts of matching funds from the U.S. Treasury). Contributions were considered spent on a first-in, first-out (FIFO) basis. If multiple types of contributions were received on the same day, the contributions were applied to disbursements in the following order: primary, general, matching funds.
4. The last day that any primary election contributions submitted for matching funds were still in the general election account was December 20, 2012. Therefore, the calculation of non-qualified campaign expenses from that account ended on that date.

Following these procedures resulted in the most favorable repayment calculation for GJ2012.

Pursuant to 11 CFR §9038.2(b)(2)(iii)(B), calculation of non-qualified expenses from all of GJ2012's accounts would continue until no matching funds were left in any of the accounts. This "zero-out date" occurred on February 20, 2014. In order to completely and accurately calculate whether non-qualified expenses were paid with

matching funds, the Audit staff needed information from GJ2012 about contributions received so that the amounts received for the primary and general elections could be accurately recorded. Although this information was requested, GJ2012 provided no contribution detail dated after December 31, 2012. In addition, although the Audit staff requested bank statements, no bank statements for the general account were received after the November 2013 statement. This type of information is regularly requested from committees that have received federal matching funds. Without these bank statements, the Audit staff does not know what expenditures have been made and cannot determine if these expenditures were for the primary or general election. Given the lack of documentation, the Audit staff was unable to verify the receipts or expenditures after December 31, 2012. However, the Audit staff was able to verify the date the last contribution submitted for matching funds was deposited to the general account. Thus, the Audit staff used December 20, 2012, as the cutoff date for examining the both accounts for non-qualified expenses.¹⁶

In accordance with 11 CFR §9038.2(b)(2)(iii), the ratio of repayment was calculated at 27.9053%.¹⁷ This ratio applied to the non-qualified expenses equals a repayment amount of \$334,780.¹⁸

2. Preliminary Audit Report & Audit Division Recommendation

The Audit staff presented this matter to GJ2012 representatives at the exit conference along with schedules detailing the finding. GJ2012 representatives did not comment on this finding. The Audit staff recommended that GJ2012 demonstrate it did not make non-qualified expenses or provide any other additional comments it deemed necessary. It was further stated that, absent such evidence, the Audit staff would recommend that the Commission determine that \$334,780¹⁹ is repayable to the U.S. Treasury.

3. Committee Response to Preliminary Audit Report

In response to the Preliminary Audit Report, GJ2012 counsel stated that since qualified campaign expenses exceeded the amount of matching funds received by \$95,585, "...no matching funds were used to pay for non-qualifying campaign expenses...". In addition, GJ2012 claims that certain non-qualified campaign expenses totaling \$1,220 identified by the Audit staff were paid solely with available general election funds. GJ2012 also states that expenses totaling \$7,301 identified as being unallocated between primary and general activities were not paid with matching funds but solely with general election funds.

¹⁶ Audit staff's estimate of the additional amount of possible non-qualified expenses is \$16,000, which would result in an additional repayment amount of about \$4,450. The \$16,000 estimate is based on the provided bank statements through November 2014, and assumes that all the expenses were paid using contributions to the primary election.

¹⁷ Matching funds certified as of 90 days post-DOI divided by deposits for the Primary election as of 90 days post-DOI (\$303,751/\$1,088,509 = 0.279053).

¹⁸ The ratio applied to the Audit staff's revised non-qualified expenses using an end calculation date of December 20, 2012 (as explained in footnote 14) is \$333,307.

¹⁹ See footnote 18.

In each of the instances noted above, GJ2012's calculation fails to apply the amount of private contributions received and applied towards remaining net outstanding campaign obligations after the Candidate's DOI. Pursuant to 11 CFR §9034.4, "...all contributions received by an individual from the date he or she becomes a candidate and all matching payments received by the candidate shall be used only to defray qualified campaign expenses...". Therefore, the Audit staff maintains that both the amount of private contributions and the amount of matching funds are applied to qualified campaign expenses. According to the Audit staff, this calculation continues to indicate that matching funds were part of GJ2012's account balance until February 20, 2014 and prior to that time the identified non-qualified campaign expenses for the general election were paid, in part, with primary election matching funds and are subject to repayment.

GJ2012's response also references newly discovered debts and other debts related to the Primary activity, including a \$300,000²⁰ win bonus owed to NSON, and states that these debts should be included in the calculation. In doing so, GJ2012 asserts that this would move up the date on which Federal matching funds were no longer in the account, thereby reducing the repayment amount.²¹ The Audit staff notes that debts are not part of the calculation of non-qualified expenses. Expenditures considered in a repayment determination under 11 CFR 9038.2(b)(2)(ii) and (3) include all non-qualified and undocumented expenditures incurred and paid between the campaign's date of inception, and the date on which the candidate's accounts no longer contain any matching funds. Outstanding debts and newly discovered debts are not included in the repayment calculation.

Finally, GJ2012's response noted an expense incorrectly classified by Audit staff as a general election expense instead of a primary election expense. The amount of identified non-qualified campaign expense has been adjusted to be considered as a qualified campaign expense and accordingly, the Audit staff has reduced the total repayment amount by \$1,116 (\$4,000 x 27.9053%).

The Audit staff recommended that the Commission make a determination that \$332,191 is repayable to the U.S. Treasury.

4. Draft Final Audit Report

The Draft Final Audit Report acknowledged GJ2012's arguments for recalculation of non-qualified expenses. The Audit staff disputed those arguments and recommended that the Commission make a determination that \$332,191 is repayable to the U.S. Treasury.

²⁰ GJ2012 further states that the bonus is a qualified campaign expense, however, pursuant to 11 CFR §9034.4(a)(5)(ii), monetary bonuses must be paid no later than thirty days after the date of ineligibility to be considered qualified campaign expenses. These bonuses have not been paid, therefore, the \$300,000 bonus owed to NSON is a non-qualified campaign expense, and as such, is not reflected in the NOCO (Finding 1, p. 8).

²¹ Non-qualified expenses paid after the candidate's accounts are presumed to have been purged of all matching funds are not subject to repayment since the candidate's accounts contained no matching funds.

5. Committee Response to the Draft Final Audit Report

In response to the Draft Final Audit Report, GJ2012 disputed the premise²² for the Audit staff's calculation of amounts owed to the U.S. Treasury and stated that GJ2012 acted in good faith.

6. Audit Hearing

Counsel stated that if it were not for the failure to update the disclaimer on GJ2012's website, GJ2012 would have been compliant with the Matching Fund Act. Counsel stated that GJ2012 acted as it thought it was allowed to, allocating the first \$250 from each contributor to the primary election and getting that amount matched, and allocating all subsequent amounts from each contributor to the general election.

Counsel presented a chart that showed that funds post-DOI were deposited first to the general election account, then the first \$250 from each contributor was transferred to the primary election account, thus keeping matchable and non-matchable contributions separate. He further stated that he sees the Audit staff's calculations, based on commingled accounts, as an overbroad interpretation of the Kennedy case (Kennedy for President Committee v. Federal Election Commission (D.C. Cir. 1984)). Counsel explained that the accounts were separate, with all matching funds and primary contributions kept in one account, and all general contributions kept in another account. He stated that every expense that primary funds were used for was a qualified expense, and that the activity is clearly separated. Counsel further stated that the repayment ratio formula did not need to be applied in this case because the activity can clearly be seen, and that using the repayment ratio does not meet the purpose of the statute.

Counsel was also permitted to submit an additional statement after the audit hearing. This statement again addressed the legal premise for the method of calculation of repayment.²³

Commission Conclusion

On June 18, 2015, the Commission considered the Audit Division Recommendation Memorandum in which the Audit staff recommended the Commission make a determination that \$332,191 is repayable to the U.S. Treasury.

The Commission approved the Audit staff's recommendation.

B. Receipt of Matching Funds Based on Ineligible Contributions

1. Facts

During an examination of receipts in audit fieldwork, the Audit staff identified five contributions designated to the general election totaling \$8,000 that were submitted

²² OGC has addressed GJ2012's arguments in its legal analyses on the DFAR and the Audit Division Recommendation Memorandum.

²³ As stated in footnote 22.

for matching funds. These contributions were ineligible to be matched for primary election funds. The amount of matching funds awarded for these ineligible contributions was \$1,250.

2. Preliminary Audit Report & Audit Division Recommendation

The Audit staff presented this matter to GJ2012 representatives at the exit conference along with schedules detailing the finding. GJ2012 representatives did not comment on this finding. The Audit staff recommended that GJ2012 show that the contributions were not general election contributions or provide any other additional comments it deemed necessary. It was further stated that, absent such evidence, the Audit staff would make a recommendation that the Commission make a determination that \$1,250 is repayable to the U.S. Treasury.

3. Committee Response to Preliminary Audit Report

In response to the Preliminary Audit Report recommendation, GJ2012 stated that it was investigating whether or not these contributions were "...accidentally attributed to the wrong spouse." If the Committee's investigation determines that the contributions were, in fact, ineligible, Counsel states that GJ2012 would refund the appropriate amount to the U.S. Treasury.

The Audit staff recommended that the Commission make a determination that \$1,250 is repayable to the U.S. Treasury.

4. Draft Final Audit Report

The Draft Final Audit Report acknowledged that GJ2012 was investigating the ineligible contributions. The Audit staff recommended that the Commission make a determination that \$1,250 is repayable to the U.S. Treasury.

5. Committee Response to the Draft Final Audit Report

In response to the DFAR, GJ2012 agreed with the Audit staff's calculation of matching funds received based on contributions ineligible to be submitted, and stated that they would repay this amount to the U.S. Treasury.

6. Audit Hearing

GJ2012 did not address this part of the finding during the audit hearing.

Commission Conclusion

On June 18, 2015, the Commission considered the Audit Division Recommendation Memorandum in which the Audit staff recommended the Commission make a determination that \$1,250 is repayable to the U.S. Treasury.

The Commission approved the Audit staff's recommendation.

Finding 3. Use of General Election Contributions for Primary Election Expenses

Summary

During audit fieldwork, the Audit staff's review of GJ2012's receipts and disbursements during the pre-DOI period indicated that GJ2012 spent \$12,396 in general election receipts on primary election expenses prior to the Candidate's DOI.

In response to the Preliminary Audit Report, GJ2012 stated that the use of general election receipts for primary election expenses was an advance against anticipated matching funds. The Audit staff noted that short-term advances against matching funds must come from a qualified financial institution, and be secured by certified matching funds amounts.

The Commission approved a finding that GJ2012 used \$12,936 in general election contributions for primary election expenses prior to the general election.

Legal Standard

Receipt of General Election contributions before the date of the Primary Election.

(1) If the candidate, or his or her authorized committee(s), receives contributions that are designated for use in connection with the general election pursuant to 11 CFR §110.1(b) prior to the date of the primary election, such candidate or such committee(s) shall use an acceptable accounting method to distinguish between contributions received for the primary election and contributions received for the general election. Acceptable accounting methods include, but are not limited to:

- (i) The designation of separate accounts for each election, caucus or convention; or
- (ii) The establishment of separate books and records for each election.

(2) Regardless of the method used under paragraph (e)(1) of this section, an authorized committee's records must demonstrate that, prior to the primary election, recorded cash-on-hand was at all times equal to or in excess of the sum of general election contributions received less the sum of general election disbursements made. 11 CFR §102.9(e).

Facts and Analysis

A. Facts

During audit fieldwork, the Audit staff reviewed available receipt and disbursement records to determine what contributions, if any, were designated per contributor solicitation devices to the general election and then spent by GJ2012 on primary election expenses prior to the primary election date (May 5, 2012). Committees are not permitted to spend funds designated to the general election for primary election expenses prior to the primary election date. If general election funds are held in the primary election account, the general election funds should be held in reserve and not spent for primary election purposes.

Prior to the primary election, GJ2012 received a total of \$22,396 designated to the general election that was deposited in the primary election account. The Audit staff

B. Preliminary Audit Report & Audit Division Recommendation

The Audit staff recommended that GJ2012 provide documentation to demonstrate that general election contributions were not used to fund primary election activity. In accordance with 11 CFR §102.9, documentation should demonstrate that an acceptable accounting method was used. Absent such a demonstration, GJ2012 was to provide any additional comments it considered necessary with respect to this matter.

In response to the Preliminary Audit Report recommendation, GJ2012 stated that the \$12,396 was treated as an advance against anticipated matching funds from the general election contributions to the primary election.

To the extent that GJ2012 is characterizing the advance of general election funds as a loan to the primary account, it is noted that regulations specify that such loans or advances must come from a qualified financial institution, which the general account is not. It is also noted that short term loans to Presidential primary committees were obtained in the past, however, these loans were secured by matching fund amounts certified and expected to be received by the committees and occurred only when the Presidential Campaign fund was in a shortfall position. Matching funds for GJ2012 were not certified until May 25, 2012 and the Presidential Campaign fund was not in a shortfall position in 2012. In no instances were general election contributions permitted to be used for primary election expenditures.

Attachment 1
Page 24 of 34

primary account and nearly all receipts after DOI in its designated general account. GJ2012 further stated that Audit staff based its calculation on cash on hand and did not take into account the delay in deposits collected through credit card processors. These would be considered received, but would not be in GJ2012's bank account immediately.

In fact, as this is a common occurrence with campaign committees, the Audit staff took this deposit delay into account. The Audit staff used GJ2012's contributions database for this calculation, which uses the date of contribution rather than the date of deposit.

D. Draft Final Audit Report

The Draft Final Audit Report acknowledged GJ2012's statement that the use of general election contributions was treated as an advance against anticipated matching funds, but the Audit staff disputed that an advance from general election contributions rather than from a lending institution was allowable.

E. Committee Response to the Draft Final Audit Report

In response to the Draft Final Audit Report, GJ2012 requested that the arguments made in response to the Preliminary Audit Report be reconsidered and requested an audit hearing to present its arguments.

F. Audit Hearing

During the audit hearing, Counsel agreed that GJ2012 did use general election contributions for primary election expenses. However, Counsel stated that these were only to cover short term gaps in cash flow and it would have been a burden to seek outside funds for such short term matters. Counsel stated that the finding lacks context, and that it seems unreasonable and not the intent of the Act to force committees to engage in commercial transactions in order to cover such short term cash flow issues. Counsel emphasized that these were short-term loans only, and stated that he thought that it would be easy to tell if any committee was abusing this leeway.

Commission Conclusion

On June 18, 2015, the Commission considered the Audit Division Recommendation Memorandum in which the Audit staff recommended the Commission find that GJ2012 used \$12,936 in general election contributions for primary election expenses prior to the general election.

The Commission approved the Audit staff's recommendation.

Finding 4. Reporting of Debts and Obligations

Summary

During audit fieldwork, the Audit staff's review of GJ2012's disbursements indicated that debts from seven vendors totaling \$407,455 were not disclosed on Schedule D-P (Debts and Obligations), as required.

In response to the Preliminary Audit Report, GJ2012 submitted additional invoices for debts to two vendors that were not previously disclosed to Audit staff. This resulted in a total of \$447,567 in debts owed to nine vendors that were not disclosed on Schedule D-P as required. GJ2012 amended its reports to materially correct the disclosure of debts and obligations on Schedule D-P.

The Commission approved a finding that that GJ2012 did not disclose debts to nine vendors totaling \$447,567, as required.

Legal Standard

A. Continuous Reporting Required. A political committee must disclose the amount and nature of outstanding debts and obligations until those debts are extinguished. 52 U.S.C. §30104(b)(8) and 11 CFR §§104.3(d) and 104.11(a).

B. Separate Schedules. A political committee must file separate schedules for debts owed by and to the committee with a statement explaining the circumstances and conditions under which each debt and obligation was incurred or extinguished. 11 CFR §104.11(a).

C. Itemizing Debts and Obligations.

- Once it has been outstanding 60 days from the date incurred, a debt of \$500 or less must be reported on the next regularly scheduled report.
- A debt exceeding \$500 must be disclosed in the report that covers the date on which the debt was incurred, except reoccurring administrative expenses (such as rent) shall not be reported as a debt before the payment due date. 11 CFR §104.11(b).

Facts and Analysis

A. Facts

During audit fieldwork, the Audit staff used available disbursement records to reconcile the accounts²⁴ of GJ2012's vendors.²⁵ These vendors provided GJ2012 with various campaign management services such as fundraising, accounting, clerical and administrative staff, and travel arrangements.

The Audit staff identified debts to seven of GJ2012's vendors totaling \$407,455 that were not reported on Schedule D-P as required. Of these debts, \$300,000 was owed to NSON for a bonus after the Candidate received the nomination as the Libertarian Party candidate for the Presidential general election. This bonus was incurred, per contract, as of the date of nomination, May 4, 2012, and should have been reported on the 2012 June Monthly report, covering the time period from May 1, 2012 through May 31, 2012.

²⁴ The reconciliation consisted of calculating invoiced and paid amounts for individual reporting periods in the 2011-2012 campaign cycle. The Audit staff then determined whether any outstanding debts were correctly disclosed on Schedule D-P. Each debt amount was counted once, even if it required disclosure over multiple reporting periods.

²⁵ The Audit staff restricted this review to only primary campaign debts, as per the scope of this Audit.

It should be noted that GJ2012 was invoiced for half of this debt (\$150,000) on December 21, 2012, and reported it on the 2012 Year-End report. However, the Audit staff maintains the debts should have been reported as debt for the entire amount based on the date and terms of the contract. The remaining reportable debts of \$107,455 were for smaller amounts to all six vendors identified by the Audit staff.

B. Preliminary Audit Report & Audit Division Recommendation

The Audit staff presented this matter to GJ2012 representatives at the exit conference and provided schedules detailing the unreported debts for each reporting period covered by the audit. In response to the exit conference, GJ2012 submitted one additional invoice for the other half of the bonus referenced in the "Facts" section above. This invoice was dated January 1, 2013. As of the date the Preliminary Audit Report was sent to GJ2012, this \$150,000 had not been disclosed on any reports filed with the Commission.

The Audit staff recommended that GJ2012 provide documentation demonstrating that these expenditures did not require reporting on Schedule D-P. Absent such documentation, the Audit staff recommended that GJ2012 amend its reports to disclose the outstanding debts.

C. Committee Response to Preliminary Audit Report

In response to the Preliminary Audit Report recommendation, GJ2012 amended its reports and submitted additional invoices and documentation for other previously undisclosed debts. Adjustments made by the Audit staff based on the additional documentation provided reduced the original determination of debts and obligations not timely reported amount by \$7,758.

GJ2012 submitted additional invoices from two new vendors that were not previously provided to the Audit staff, nor disclosed on Schedule D-P, for debts incurred within the audit period totaling \$47,870. In combination with the seven vendors noted in the Preliminary Audit Report, the Audit staff has thus identified nine vendors that GJ2012 owed \$447,567 that was not reported on Schedule D-P as required. GJ2012 filed amendments that materially corrected these omissions.

In its initial response to the Preliminary Audit Report, GJ2012 disputed that the \$300,000 owed to NSON for a bonus was not timely reported. GJ2012 states that the NSON contract "...specifically states that invoices are due and payable upon receipt," and that the vendor not invoicing timely does not create a reportable debt, since the campaign would not be able to base the debt reporting on an invoice.

Pursuant to 11 CFR §104.11(b), "[a] debt or obligation, including a loan, written contract, written promise or written agreement to make an expenditure... shall be reported as of the date on which the debt or obligation is incurred..." GJ2012 made a written agreement on October 14, 2011, that NSON would be owed a bonus of "\$300,000 for receiving any party nomination as either VP or President." Thus, this debt was incurred on the date of the Candidate's nomination by the Libertarian Party at its convention on May 5, 2012,

and should have been reported as a debt or obligation on Schedule D-P on the June Monthly Report that covered May 1, 2012 through May 31, 2012, regardless of when it was invoiced.

In a supplemental response to the Preliminary Audit Report, GJ2012 stated that it has deferred to Audit staff's judgment that the \$300,000 win bonus should be reported as of the date of the Candidate's nomination, despite not having been invoiced.²⁶ GJ2012 filed amendments to its reports to report this obligation as of May 2012.

D. Draft Final Audit Report

The Draft Final Audit Report acknowledged that GJ2012 filed amendments to materially correct its reporting of debts and obligations.

E. Committee Response to the Draft Final Audit Report

In response to the Draft Final Audit Report, GJ2012 discussed its method of accounting, in which GJ2012 "re-allocated payments" in December of 2014 to pay off \$171,000 of the \$300,000 win bonus within the 30-day regulatory requirement, so that the \$171,000 would be considered a qualified expense.²⁷ GJ2012 also requested an audit hearing to address this matter.

F. Audit Hearing

During the audit hearing, Counsel stated that GJ2012 had amended its reports to correctly report debts and obligations, and that there were no further substantive comments regarding this finding.

Commission Conclusion

On June 18, 2015, the Commission considered the Audit Division Recommendation Memorandum in which the Audit staff recommended the Commission find that GJ2012 did not disclose debts to nine vendors totaling \$447,567, as required.

The Commission approved the Audit staff's recommendation.

²⁶ GJ2012 further stated that they, "in conjunction with NSON, reallocated prior payments to NSON to this earlier Primary expenditure to ensure that payments were made on a First in-First out basis." The Audit staff believes that GJ2012 cannot reallocate these payments in such a manner. It appears that GJ2012 has decided to apply this procedure in an attempt to reduce the amount of repayment to the U.S. Treasury as detailed in Finding 2. However, this "re-allocation" of payments would still not result in the win bonus being paid within the statutory 30 day period (see footnote 20 for additional detail), so this remains a non-qualified expense regardless of the accounting convention used. In fact, to alter the accounting method to pay this debt off would result in additional non-qualified expenses paid using matching funds, which would actually result in an even larger repayment to the U.S. Treasury.

²⁷ This argument pertains to the calculations in Finding 2 of non-qualified expenses, not to the substance of Finding 4.

Part V Additional Issue

Extension of Credit by a Commercial Vendor

Summary

During audit fieldwork, the Audit staff's review of GJ2012's disbursements suggested that NSON²⁸ made a prohibited contribution to GJ2012 by extending credit beyond its normal course of business and not making commercially reasonable attempts to collect \$1,752,032 from GJ2012 for services rendered.

In response to the Preliminary Audit Report, GJ2012 presented an affidavit from the proprietor of NSON and redacted contracts to dispute the Audit staff's suggestion that NSON made a prohibited contribution to GJ2012. The Audit staff did not consider these documents sufficient to verify that other clients were subject to the same billing practices or that GJ2012 was regularly and timely billed for services rendered.

The Commission did not approve by the required four votes the Audit staff's recommended finding that NSON made a prohibited contribution to GJ2012. Pursuant to Directive 70,²⁹ this prohibited contribution is discussed in the "Additional Issue" section.

Legal Standard

A. Contribution defined. A gift, subscription, loan (except when made in accordance with 11 CFR §100.72 and §100.73), advance, or deposit of money or anything of value made by a person for the purpose of influencing any election for Federal office is a contribution. The term "anything of value" includes all in-kind contributions.

The usual and normal charge for a service is the commercially reasonable rate that one would expect to pay at the time the services were rendered.

The provision of services at a charge less than the usual and normal charge results in an in-kind contribution. The value of such a contribution would be the difference between the usual and normal charge for the services and the amount the political committee was billed and paid. 11 CFR §100.52(a) and (d).

B. Corporate Contributions Impermissible. A corporation is prohibited from making any contribution in connection with a federal election. 52 U.S.C. §30118(a).

C. Definition of Commercial Vendor. A commercial vendor is any person who provides goods or services to a candidate or political committee and whose usual and

²⁸ NSON is a registered corporation in the state of Utah that also does business as Political Advisors. GJ2012 reported disbursements to Political Advisors, but all contracts and invoices were received from NSON.

²⁹ Available at http://www.fec.gov/directives/directive_70.pdf

normal business involves the sale, rental, lease or provision of those goods or services.
11 CFR §116.1(c).

D. Extension of Credit by Commercial Vendor. A commercial vendor, whether or not it is a corporation, may extend credit to a candidate or political committee provided that:

- The credit is extended in the vendor's ordinary course of business (see below); and
 - The terms of the credit are similar to the terms the vendor observes when extending a similar amount of credit to a nonpolitical client of similar risk.
- 11 CFR §116.3(a) and (b).

E. Definition of Ordinary Course of Business. In determining whether credit was extended in the ordinary course of business, the Commission will consider whether:

- The commercial vendor followed its established procedures and its past practice in approving the extension of credit;
- The commercial vendor received prompt, full payment if it previously extended credit to the same candidate or political committee; and
- The extension of credit conformed to the usual and normal practice in the commercial vendor's industry or trade. 11 CFR §116.3(c).

Facts and Analysis

A. Facts

During audit fieldwork, the Audit staff's review of GJ2012's disbursements suggested that GJ2012 accepted a prohibited contribution that NSON made by extending credit beyond its normal course of business and not making commercially reasonable attempts to collect \$1,752,032 from GJ2012 for services rendered relating to the primary election.³⁰

On October 14, 2011, GJ2012 entered into a contract with NSON to manage the campaign. NSON handled fundraising, press and media relations, creative advertising, and all administrative functions of the primary election campaign. Disbursements to NSON totaled 86% of the total of all disbursements by GJ2012, and 89% of GJ2012's outstanding debt as of December 31, 2012 was owed to NSON. From April 21, 2011 through December 21, 2012, NSON invoiced GJ2012 \$2,198,204 for campaign management expenses, including fundraising, clerical work, and travel arrangements. As of March 31, 2013, \$1,752,032 had been outstanding more than 120 days, and \$936,247 remains outstanding. To date, GJ2012 has only made payments of \$1,261,957 for the \$2,198,204 invoiced by NSON.

The terms of the contract between GJ2012 and NSON stated that:

NSON may assess a carrying charge of eighteen percent (18%) per annum on payments not made within thirty (30) days of the date of the invoice. NSON may, at its sole discretion and without notice, suspend its services hereunder should Client not pay in

³⁰ Audit staff restricted this review to only primary campaign services, as per the scope of this audit.

full any amount invoiced. NSON further reserves the right, at its sole discretion to withhold from Client any instruments of NSON's services pending payment on Client's account.

NSON had not assessed any interest charges as of March 31, 2013. During audit fieldwork, GJ2012 did not provide Audit staff with documentation of attempts by NSON to collect on the outstanding debt.

B. Preliminary Audit Report & Audit Division Recommendation

The Audit staff presented this matter to GJ2012 representatives at the exit conference and provided schedules detailing the extensions of credit for primary election expenses. Audit staff requested that GJ2012 provide evidence that NSON made commercially reasonable attempts to collect the outstanding amount. In response to the exit conference, on January 17, 2014, GJ2012 submitted an accounts receivable aging schedule for other clients of NSON to show that credit was extended on similar terms to other committees, a copy of a lawsuit filed by NSON in the state of Utah against another client, and a bill dated December 31, 2013, for \$245,527 in interest on the outstanding debts from GJ2012 to show that NSON was attempting to collect on the outstanding debt. The aging schedule detailed the outstanding amounts from nine clients, including another political committee also associated with the Candidate. Six of these clients had debt outstanding more than 300 days, and 84% of the total debt outstanding on the aging schedule was owed by the political committee.

GJ2012 quoted an NSON response to a query the Committee had made to this vendor,

Ongoing attempts have been made and continue to be made to collect the outstanding debt owed from the Gary Johnson 2012 campaign. These include support and help with continued solicitation for donations. Any and all other legal remedies are and will be considered to satisfy the obligation.

The Audit staff reviewed the documentation submitted in response to the exit conference. Although GJ2012 provided an internally generated aging schedule and a copy of a lawsuit filed, GJ2012 did not provide any contracts with, or invoices to, other clients of NSON. As such, the Audit staff could not verify with a reasonable certainty that NSON's contract with GJ2012 was offered on the same terms or pursued in the same manner as other NSON clients, political or non-political.

In addition, on June 18, 2014, GJ2012 submitted several new invoices for interest charged by NSON on debts outstanding from January 2014 through June 2014.

The Audit staff recommended that GJ2012 provide documentation, to include statements from this vendor that demonstrates the credit extended was in the normal course of business and did not represent an excessive in-kind contribution by the vendor. The information provided may include examples of other non-political customers/clients of similar size and risk for which similar services were provided and similar billing arrangements were used. Also, Audit staff recommended that GJ2012 provide information concerning the presence of safeguards such as billing policies for similar non-political clients and work, advance payment policies, and debt collection policies and

practices to show that this was normal business practice for NSON or provide additional explanation about the situation.

C. Committee Response to Preliminary Audit Report

In response to the Preliminary Audit Report recommendation, GJ2012 provided additional information about the business practices of NSON. In an affidavit, Ron Nielson, the proprietor of NSON, stated that his company did not extend credit to GJ2012 that it would not have extended to a similar non-political campaign. Mr. Nielson stated that NSON exercises discretion in the assessing and collecting of finance charges in order to collect on the principal, and that NSON has previously waived finance charges in favor of collecting on the principal. In addition, Mr. Nielson stated that NSON has engaged in discussions with GJ2012 to accept campaign assets in lieu of payment.

GJ2012 also submitted redacted contracts that NSON used for other political and non-political campaigns. The non-redacted portions of these contracts are substantially similar to the one signed by GJ2012. Counsel for GJ2012 further states that NSON acted according to normal and usual practice in the industry, and that NSON and its competitors frequently extend credit to clients seeking similar services in anticipation that doing so would enable the clients to raise funds.

In addition, Counsel for GJ2012 stated that NSON and GJ2012 were negotiating for the acceptance of campaign assets in lieu of payments owed, and that NSON may waive interest fees "as is routine in such matters."³¹

The NSON contracts provided by GJ2012 are redacted to the extent that the Audit staff cannot verify whether or not the clients are political or non-political. Since the nature of these entities cannot be verified, the Audit staff does not find these contracts to be adequate evidence that credit was extended to GJ2012 in the same way as other political and non-political clients.

Furthermore, documentation provided by GJ2012 to show that NSON attempted to collect on outstanding debts did not show that "NSON regularly invoiced GJ2012 for all services..." In fact, GJ2012 was not invoiced for services in some cases until months or even more than a year after the services were performed. NSON did not submit invoices for interest due on amounts owed until December 31, 2013, more than a year after the Candidate's date of ineligibility, for invoices that had been outstanding for thirteen (13) to twenty-two (22) months. In addition, no documentation such as invoices to other non-political clients has been presented to show that NSON has also treated the collection of amounts due by non-political clients in the same manner.

Pursuant to 11 CFR §9034.5(c), Presidential campaigns are required to report on the NOCO all capital assets whose purchase price exceeded \$2,000, and other assets whose value exceeds \$5,000, and maintain a list of these items. GJ2012 did not disclose any

³¹ If GJ2012 and NSON come to an agreement to settle the Committee's debts for less than has been billed, GJ2012 will need to file a debt settlement plan and seek Commission review of this settlement, pursuant to 11 CFR §116.7.

assets on the NOCO statements submitted when applying for matching funds, nor were any lists provided to the Audit staff during fieldwork. The Audit staff requests that GJ2012 submit documentation for any assets owned and not previously disclosed to the Commission.

The Audit staff notes that NSON had billed GJ2012 \$345,333 in interest as of October 15, 2014, and the Audit staff has estimated that \$85,893 in additional interest will be billed by NSON to GJ2012 by June 30, 2015. Both of these amounts are reflected in the NOCO in Finding 1 of this report.

If GJ2012 and NSON come to a mutual agreement on debts less than the amounts owed and the debt settlement plan is reviewed and approved by the Commission, then the lower amount owed would necessarily reduce the total liabilities on the NOCO statement and likely result in the receipt of matching funds in excess of the Candidate's entitlement. Further repayment may also result if GJ2012 discloses newly-discovered assets.³²

D. Draft Final Audit Report

The Draft Final Audit Report acknowledged that GJ2012 submitted redacted contracts between NSON and other clients, and an affidavit from Ron Nielson, proprietor of NSON that stated his company did not extend credit to GJ2012 that it would not have extended to a similar non-political campaign. Mr. Nielson stated that NSON exercises discretion in the assessing and collecting of finance charges in order to collect on the principal, and that NSON has previously waived finance charges in favor of collecting on the principal. In addition, Mr. Nielson stated that NSON has engaged in discussions with GJ2012 to accept campaign assets in lieu of payment.

E. Committee Response to the Draft Final Audit Report

In response to the Draft Final Audit Report, GJ2012 stated that NSON should not be forced to reveal the names of its clients, and that it is in the normal course of business for an entity to be late in billing. GJ2012 further stated that it could not value the assets referred to in their response to the Preliminary Audit Report at this time, and that it will not pursue debt settlement until after the audit is completed. In its response to the Draft Final Audit Report, GJ2012 also requested an audit hearing to present the Committee's arguments.

F. Audit Hearing

During the audit hearing, Counsel stated that GJ2012 does not believe that there was any extension of credit by NSON outside its normal course of business. Counsel stated that the language of the contract stated that NSON *may* assess interest charges, not that the company *must* assess those charges. Counsel further stated that vendors regularly use the threat of interest charges as leverage and do not always assess those charges. In addition, Counsel stated that there is nothing that says a vendor must sue in order to get paid. In fact, it would not be in the vendor's best interest to litigate, as it might damage its reputation and may lead to a difficulty in finding or keeping other clients. Counsel stated

³² Also note the repayment amount for non-qualified expenses identified in Finding 2 would also require adjustment.

1700444-1000000

that any vendor would work with their client in order to seek payment without litigation, and stated that there have been conversations between NSON and GJ2012 in order to resolve the outstanding payments. Counsel also stated that part of the attempt to settle the outstanding debts hinges on intangible assets for which GJ2012 does not yet have a value. Counsel stated that GJ2012 could not value the assets until after the audit and repayment process is over, because over time, the assets lose value, and they may also lose value if GJ2012 must make a large repayment to the U. S. Treasury.

Counsel addressed the Audit staff's assertion in the Draft Final Audit Report that it is unable to determine whether the contracts between NSON and other clients indicate that NSON contracted with other political and non-political clients in the same manner, because the client names have been redacted. Counsel stated that the fact that these contracts are all substantially similar shows that NSON contracted in the same manner with all its clients. Counsel further stated that it would not be reasonable to breach confidentiality with those clients to reveal their names so that the Audit staff can verify that the provided contracts are with both political and non-political clients.

Commission Conclusion

On June 18, 2015, the Commission considered the Audit Division Recommendation Memorandum in which the Audit staff recommended the Commission find that NSON made a prohibited contribution to GJ2012 by extending credit beyond the normal course of business and not making commercially reasonable attempts to collect \$1,752,032 from GJ2012 for services rendered.

The Commission did not approve, by the required four votes, the Audit staff's recommendation. Some Commissioners voted to approve the Audit staff's recommendation. Others did not, stating that they deemed the affidavit from Mr. Nielson, contracts showing substantially similar terms offered to other clients, accounts receivable aging schedules for both GJ2012 and other clients, and invoices for interest charged by NSON on outstanding debt sufficient to document that the billing practices were normal and usual.

This contribution is discussed in the "Additional Issue" section pursuant to Commission Directive 70.³³

³³ Available at http://www.fec.gov/directives/directive_70.pdf.

1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3
4
5 **MUR:** 6639

6
7 **RESPONDENTS:** Gary Johnson 2012, Inc. and Joseph Lilly in his official capacity as
8 treasurer¹
9

10 **I. INTRODUCTION**

11 This matter was generated by a Complaint filed with the Federal Election Commission
12 ("Commission") and information ascertained by the Commission in the normal course of
13 carrying out its supervisory responsibilities. The Complaint alleges that Gary Johnson 2012, Inc.
14 and Joseph Lilly in his official capacity as treasurer ("Gary Johnson 2012") violated the Federal
15 Election Campaign Act of 1971, as amended (the "Act") by failing to properly disclose
16 disbursements and debts owed to an entity called "Political Advisors" of Salt Lake City in its
17 2012 June, July, and August Monthly Reports.² The Complaint further alleges that Gary
18 Johnson 2012 failed to specify whether the reports themselves or the disbursements on those
19 reports were for the primary or general election, despite having reported receiving contributions
20 designated for the general election.³ The Audit Division also referred Gary Johnson 2012 to the
21 Office of the General Counsel for possible enforcement action regarding: (1) the use of general
22 election contributions for primary election expenses; and (2) the failure to report a total of
23 \$447,567 in debts and obligations.⁴

¹ On July 6, 2015, Gary Johnson 2012, Inc. filed an Amended Statement of Organization naming Joseph Lilly as its new treasurer. See Amended Statement of Organization at 1 (July 6, 2015).

² Compl. at 1-3.

³ *Id.*

⁴ See Referral at 1-7.

1 For the reasons discussed below, the Commission dismisses the Complaint's allegation
2 that Gary Johnson 2012 violated 52 U.S.C. § 30104(b) and 11 C.F.R. § 104.3 because the
3 committee reported multiple purposes for each disbursement or debt. Nevertheless, based on the
4 facts, analysis, and findings set forth in the Final Audit Report, which is incorporated by
5 reference, the Commission finds reason to believe that Gary Johnson 2012 violated 52 U.S.C.
6 § 30104(b) and 11 C.F.R. § 104.3 by failing to disclose \$447,567 in debts and obligations, and
7 violated 11 C.F.R. § 102.9(e) by using general election contributions for primary election
8 expenses.

9 **II. FACTUAL AND LEGAL ANALYSIS**

10 **A. Failure to Properly Itemize Disbursements and Debts**

11 On its 2012 June Monthly Report, Gary Johnson 2012 reported ten different
12 disbursements totaling \$188,320 to "Political [sic] Advisors" for the purpose of "Media Buys,
13 Candidate [sic] Travel, Campaign advisory and management."⁵ Next, on the 2012 July Monthly
14 Report, it reported 12 different disbursements totaling \$113,250 to "Political [sic] Advisors" for
15 the purpose of "Media Buys, Advertising, Candidate Travel, Advisory Services."⁶ And on the
16 2012 August Monthly Report, it reported eight disbursements totaling \$284,500 to "Political [sic]
17 Advisors" for the purpose of "Media Buys, Advertising, Candidate Travel, Advisory Services"
18 or "Media, Travel and Advisory Services in connection with Primary Election."⁷ In addition to
19 these disbursements, Gary Johnson 2012's 2012 July and August Monthly Reports listed four
20 separate new debts totaling \$304,145 owed to "Political [sic] Advisors" for the purposes of

⁵ Compl. at 2.

⁶ *Id.*

⁷ *Id.* at 3.

1 “Advertsing [sic], Canidate [sic] Travel, Media Buys, Advisory Services,” “Media, Travel,
2 Advertising and Advisory Service – Primary,” “Travel, Media, Advertsing [sic],” and “Travel,
3 Media, Advertising, and Advisory” on Schedule D.⁸

4 The Complaint in MUR 6639 alleges that Gary Johnson 2012 did not properly disclose
5 the disbursements and debts owed to “Political Advisors” in its 2012 June, July, and August
6 Monthly Reports because it reported multiple purposes for each disbursement or debt.⁹ On
7 February 11, 2013, the Reports Analysis Division (“RAD”) sent Gary Johnson 2012 Requests for
8 Additional Information (“RFAIs”) inquiring about those disbursement descriptions.¹⁰ The RFAIs
9 requested that the committee amend its reports to clarify the descriptions listed above.¹¹

10 On February 25, 2013, Gary Johnson 2012 amended the reports in question to disclose
11 additional debts and obligations owed to Political Advisors.¹² These debts appear to correspond
12 to the previously reported disbursements to Political Advisors. For each itemized debt reported
13 on Schedule D, however, Gary Johnson 2012 continued to report multiple purposes. For
14 example, on its Amended 2012 June Monthly Report, the committee reported a new \$112,937
15 debt to Political Advisors for “Staff Hours – Mid-Level, Senior Political Advsiors [sic], Creative
16 Advertising, Campain [sic] Consult.”¹³ The committee included a memo entry for each itemized

⁸ See *id.* at 2.

⁹ *Id.*

¹⁰ See 2012 June Monthly Report RFAI (Feb. 11, 2013); 2012 July Monthly Report RFAI (Feb. 11, 2013); 2012 August Monthly Report RFAI (Feb. 11, 2013).

¹¹ *Id.*

¹² See Amended 2012 June Monthly Report (Feb. 25, 2013); Amended 2012 July Monthly Report (Feb. 25, 2013); Amended 2012 August Monthly Report (Feb. 25, 2013).

¹³ See Amended 2012 June Monthly Report at 81 (Feb. 25, 2013).

1 debt that provided a more detailed breakdown of each invoice that accounted for the debt.¹⁴

2 However, the committee also amended its previously reported disbursements on Schedule D to
3 change the purposes to "Payment on obligation."¹⁵

4 The Federal Election Campaign Act of 1971, as amended, ("the Act") and Commission
5 regulations require political committees to itemize disbursements and debts, and, for each
6 disbursement and debt, provide information including a brief description of the purpose of the
7 disbursement or the nature of the debt.¹⁶ Descriptions, when considered along with the identity
8 of the disbursement recipient, must be sufficiently specific to make the purpose of the
9 disbursement clear.¹⁷ The Commission has noted in its Statement of Policy regarding purpose of
10 disbursement entries that a disbursement to a vendor for something like "consulting" would be
11 inadequate unless the vendor's name included the specific type of consulting that the vendor
12 engaged in, such as "Smith Fundraising Consulting, Inc."¹⁸ Examples of inadequate purposes
13 listed in the Commission's Statement of Policy include "Consulting Service," "Compensation,"
14 and "Invoice."¹⁹

15 It appears that Gary Johnson 2012 violated 52 U.S.C. § 30104(b) and 11 C.F.R.
16 § 104.3(b)(3)-(4), (d) by not properly describing some of its disbursements' and debts' purposes
17 on both its original and amended reports (e.g., "advisory service," "advisory," and "payment on

¹⁴ See *id.* at 82.

¹⁵ See *id.* at 72-75.

¹⁶ 52 U.S.C. § 30104(b); 11 C.F.R. § 104.3(b)(3)-(4), (d).

¹⁷ 11 C.F.R. § 104.3(b)(3)-(4); "Purpose of Disbursement" Entries for Filings with the Commission, 72 Fed. Reg. 887 (Jan. 9, 2007).

¹⁸ 72 Fed. Reg. at 888.

¹⁹ *Id.*

1 obligation"). Nevertheless, the disbursements and debts on the three original reports addressed
2 in the Complaint — and on all Gary Johnson 2012's reports through the 2012 Year-End Report
3 — were reviewed in the Title 26 audit. The Final Audit Report did not include any finding
4 related to the ultimate payee or purpose description of disbursements and debts to Political
5 Advisors. In light of the corrective action taken during the Audit and in response to RFAs, the
6 Commission exercises its prosecutorial discretion and dismisses the allegation that Gary Johnson
7 2012 violated 52 U.S.C. § 30104(b) and 11 C.F.R. § 104.3 by failing to properly itemize
8 disbursements and debts.²⁰

9 **B. Failure to Report Debts and Obligations**

10 The Complaint in MUR 6639 alleges that Gary Johnson 2012 failed to report any
11 indebtedness to Political Advisors on its 2012 June and August Monthly Reports.²¹ As set forth
12 in the Final Audit Report, the Commission concluded that Gary Johnson 2012 failed to disclose
13 \$447,567 in debts owed to nine vendors on Schedule D.²² Of this amount, \$300,000 was a debt
14 owed to Political Advisors²³ for a bonus after Johnson received the Libertarian Party nomination.
15 According to the audit finding, Gary Johnson 2012 reported half of the \$300,000 debt when it
16 was invoiced in December 2012, but, per the contract, the entire debt was incurred on May 4,
17 2012, and accordingly should have been reported on the committee's 2012 June Monthly

²⁰ See *Heckler v. Chaney*, 470 U.S. 821 (1985); see also Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545, 12,546 (Mar. 16, 2007) (noting that the Commission will dismiss a matter when the matter does not merit further use of Commission resources).

²¹ Compl. at 1-3.

²² Final Audit Report at 22-25.

²³ The Final Audit Report refers to this entity as "NSON," which is the corporation listed on the committee's contracts and invoices. The Final Audit Report notes that NSON also does business as Political Advisors. *Id.* at 6 n.7. The committee reported all disbursements and debts to Political Advisors, not NSON. *Id.*

1 Report.²⁴ In response to the audit, Gary Johnson 2012 filed amendments that materially
2 corrected the omissions.²⁵

3 The Act requires committee treasurers to file reports of receipts and disbursements in
4 accordance with the provisions of 52 U.S.C. § 30104.²⁶ The reports also must include the
5 amount and nature of outstanding debts and obligations owed by or to the political committee.²⁷
6 Accordingly, because it failed to disclose \$447,567 in debts and obligations as described above,
7 the Commission finds reason to believe that Gary Johnson 2012 violated 52 U.S.C. § 30104(b)
8 and 11 C.F.R. § 104.3.

9 **C. Use of General Election Contributions for Primary Election Expenses**

10 The Complaint in MUR 6639 alleges that Gary Johnson 2012 failed to disclose whether
11 its disbursements were for the primary or general election, despite having reported receiving
12 contributions designated for the general election.²⁸ In the audit, the Commission found that Gary
13 Johnson 2012 spent \$12,396 in contributions designated for the general election on primary
14 election expenses before the primary election date.²⁹ As described in the Final Audit Report, the
15 committee deposited \$22,396 in general election contributions in its primary election account,
16 and then made primary election expenses from this account.³⁰ Beginning on February 21, 2012,
17 the committee did not have sufficient primary election contributions to cover its primary election

²⁴ *Id.* at 22-25.

²⁵ *Id.*

²⁶ 52 U.S.C. §§ 30104(a)(1), 30104(b)(2)-(7); 11 C.F.R. §§ 104.1(a), 104.3(a)-(c).

²⁷ 52 U.S.C. § 30104(b)(8); 11 C.F.R. § 104.3(d).

²⁸ Compl. at 1-3.

²⁹ Final Audit Report at 20-22.

³⁰ *Id.*

1 expenses, and accordingly spent \$12,396 in general election contributions for primary election
2 expenses.³¹

3 The Act requires treasurers to keep an account of all contributions received by a political
4 committee.³² Commission regulations permit a candidate's committee to receive contributions
5 for the general election prior to the primary election provided the committee employs an
6 acceptable accounting method to distinguish between primary and general election
7 contributions.³³ The committee's records must demonstrate that prior to the primary election, the
8 committee's recorded cash-on-hand was at all times equal to or in excess of the sum of general
9 election contributions received less the sum of general election disbursements made.³⁴ The
10 Respondents argue that the audit finding applies an unreasonably strict reading of 11 C.F.R.
11 § 102.9(e)(2), and that the funds were essentially a short-term loan between accounts to cover
12 operating expenses.³⁵ However, the Final Audit Report correctly rejects these arguments.
13 Because Gary Johnson 2012 used general election contributions for primary election expenses as
14 described above, the Commission finds reason to believe that Gary Johnson 2012 violated
15 11 C.F.R. § 102.9(e).

³¹ *Id.*

³² 52 U.S.C. § 30102(c).

³³ 11 C.F.R. § 102.9(e)(1).

³⁴ *Id.* § 102.9(e)(2).

³⁵ See AR 15-06 Resp. at 1.